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Issue Date: 25 July 2005

CASE NO.: 2003-LHC-02836
OWCP NO.: 01-134620

In the Matter of

KENNETH SZABLEWSKI
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

Appearances:

Carolyn P. Kelly, Esq., O'Brien, Shafner, Stuart, Kelly & Morris, Groton, Connecticut,
for the Claimant

Conrad M. Cutcliffe, Esq., Cutcliffe, Glavin & Archetto, Providence, Rhode Island,
for the Employer

Before: COLLEEN A. GERAGHTY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

The present matter is a claim for workers' compensation and medical benefits filed by Kenneth Szablewski (the "Claimant") against the Electric Boat Corporation ("EB" or the "Employer") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges for a formal hearing, which was conducted before the undersigned administrative law judge on May 17, 2004 in New London, Connecticut.

The Claimant appeared represented by counsel, and an appearance was made on behalf of the Employer. At the hearing, the parties were afforded the opportunity to present evidence and oral argument. Testimony was heard from the Claimant and from Sowmya Sundarajan, a vocational case manager at Concentra Services. Hearing Transcript ("TR") 71. Documentary evidence was admitted as Claimant's Exhibits ("CX") 1-13 and Employer's Exhibits ("EX") 1-9. Formal papers were admitted as Administrative Law Judge Exhibits ("ALJX") 1-7. Thereafter, the parties filed post-hearing briefs, and the record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their closing arguments, I have concluded that the Claimant is entitled to temporary total disability compensation benefits for the period July 31, 1995 to August 1, 1995 and from September 9, 1995 through February 24, 1997. The Claimant is also entitled to permanent total disability benefits for the period of February 25, 1997 through May 15, 2003 and to permanent partial disability compensation benefits for a 35% permanent impairment to each knee beginning on May 16, 2003 and continuing for a period of 100.8 weeks for each knee.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At hearing, the parties stipulated to the following: (1) The Act applies to the present claim; (2) the Claimant first complained of knee problems on May 11, 1995, (3) an employer/employee relationship existed at the time of the discovery of the knee problems; (4) the Employer was timely notified of the complaint; (5) the claim for benefits was timely filed, and a Notice of Controversion was timely filed; (6) an informal conference was held on the matter on July 30, 2003; (7) the Claimant's average weekly wage is $744.05; (8) temporary total disability benefits have been paid from September 7, 1995 to March 11, 2003; (9) permanent partial disability benefits have been paid from March 12, 2003 to the present; (10) the date of maximum medical improvement was February 25, 1997; and (11) medical benefits have been paid. TR 5-7.

The remaining issues to be adjudicated at hearing are (1) causation and (2) the nature and extent of the Claimant's disability.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant was 64 years old at the time of hearing. In the early part of his working career he spent approximately twenty years in the U.S. Navy, from 1957 to 1977. TR 21-22. The Claimant is also a licensed master plumber, and upon his retirement from the Navy worked in this capacity. *Id.* at 55. The Claimant then worked in food service for the Department of Corrections from 1981 to 1984, at which time he concurrently pursued an Associate's Degree in culinary arts. *Id.* at 20-21. While employed with the Department of Corrections, the Claimant

underwent arthroscopic surgery on his left knee. *Id.* at 27. The Claimant left the Department of Corrections in 1984 and worked as a plumber at Franzini Plumbing until 1989. In June 1989, the Claimant became a pipefitter at Electric Boat, and he remained a pipefitter throughout his tenure there. *Id.* at 24.

The Claimant testified that he worked on the Employer's submarines five and sometimes six days per week, and that he had to carry a bag of tools and piping sections that weighed between 10 and 50 pounds. *Id.* at 24-25. The Claimant further testified that the Employer's submarines were situated 40 feet in the air, and that he would enter and exit the submarines via staircases and ladders approximately 1 to 4 times per day. TR 25. He stated that the pipe installation required working in confined spaces, and that he sometimes had to crawl on steel grates to access his working area. *Id*. at 26. The Claimant testified that once he reached the working space he was often required to work on his knees or in a squatting position. *Id.*

He testified that while nothing "traumatic" occurred during his employment with Electric Boat, he sometimes tripped and fell on his knees. *Id.* The Claimant stated that he first experienced burning sensations in his knees in December 1994, at which point he was examined by Dr. Richeimer, who recommended surgery. *Id.* at 27-28. On the advice of a co-worker at Electric Boat, the Claimant then made an appointment to see Dr. Cambridge, who examined him and injected cortisone shots into both knees. *Id.* at 28. The Claimant testified that the shots eased his pain for approximately six weeks, and that when he was examined by Dr. Cambridge again, Dr. Cambridge recommended surgery. *Id.* at 28-29.

Dr. Cambridge performed knee replacement surgery on both of the Claimant's knees on September 11, 1995. TR 29. He completed a regimen of physical therapy for approximately six months, until his insurance no longer covered the sessions, and then continued the exercises for four to five months following the conclusion of the physical therapy. *Id.* at 29-30.

In approximately 1997, the Claimant made efforts to return to lighter work at Electric Boat, given work restrictions that prohibited him from kneeling, squatting, walking on uneven terrain, and climbing. *Id.* at 30, 32; CX 5 at 12. The Claimant stated that he attempted to register for the Employer's drafting classes over a period of almost 6 months, and that he called a contact named Everett on a weekly basis to register, but felt that he was getting the "run-around." TR 31. In 1998, the Claimant had an interview with Deborah Brown, head of the Human Resources Department at Electric Boat, to determine if she could find the Claimant work or training. *Id.* Prior to this interview, the Claimant had applied for rehabilitation through the United States Department of Labor, and was contacted by Courtney Olds on March 10, 1998. *Id.* at 31-32; CX 6 at 1. The Claimant informed Mr. Olds that he had sought work unsuccessfully and that he had a strong desire to return to some kind of gainful employment. CX 6 at 1. Mr. Olds then contacted Alice Canger, the Light Duty Coordinator at Electric Boat and was told that no light duty was available for the Claimant. *Id.* at 2. Mr. Olds also contacted 15 plumbing companies in the region and found no present or potential openings in the foreseeable future. *Id.*

In his July 10, 1998 Vocational Rehabilitation Report, Mr. Olds further noted that the Claimant possessed average intellectual aptitude according to various aptitude tests, and that his skills should be adequate for study at a community college. *Id.* at 3. The Claimant showed

interest and ultimately enrolled in a two-year mechanical engineering course at Three Rivers Technical Community College. *Id.*; TR 36. He later switched programs to study manufacturing engineering. *Id.* at 37.

The Claimant testified that around this time he also filled out job applications and sent out resumes to all of the available jobs listed in a labor market survey performed in 1998. *Id.* at 32-33; CX 6 at 7. The Claimant stated that he also applied for a position at a plumbing supply house, but that his work restrictions kept him from applying for other plumbing positions. TR 33. In addition, the Claimant unsuccessfully sought 3 teaching positions. *Id.*

The Claimant satisfactorily continued his coursework at Three Rivers and participated in summer internships in 2000 and 2001. CX 9 at 1. However, he never completed the degree due to difficulty passing Algebra. TR 37.

The Claimant testified that he subsequently responded to all of the positions listed in a labor market survey prepared in 2003, including Pinkerton Security (now called Securitas), the Residence Inn, Best Western and Foxwoods Casinos among others. *Id.* at 38-43. The Claimant also testified that he sought employment through the Three Rivers career center, but that the manufacturing jobs listed require lifting that he cannot perform. *Id.* at 47. Because the labor market survey indicated that jobs in the hotel and restaurant management sector were available, the Claimant also began taking hotel and restaurant management classes at Three Rivers in 2003. *Id.* at 47-48. In addition, he teaches muzzle loading as a volunteer for the Boy Scouts, which he has done since the 1990s. *Id.* at 59, 61.

As of the date of hearing before this court, the Claimant remained unemployed. He has received Social Security Disability benefits since 1998.

B. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. § 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Dir., OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting

disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the Claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Dir., OWCP,* 688 F. 2d 862 (1st Cir. 1982).

In support of his prima facie case, the Claimant relies primarily on the medical opinion of Dr. William R. Cambridge, an orthopedic surgeon with New London County Orthopedic Surgery, P.C. CX 5 at 3. Dr. Cambridge diagnosed the Claimant with severe tricompartmental degenerative arthritis and ultimately performed knee replacement surgery on both of the Claimant's knees on September 11, 1995. In a December 27, 1995 letter, Dr. Cambridge states that in his opinion the Claimant had a "severe pre-existing bilateral degenerative arthritis of his knees." *Id.* He further opines that the Claimant's pre-existing knee condition would be exacerbated in a work environment that includes climbing ladders, crawling, bending, squatting, and working in confined spaces. He states that such work "would have a dramatic impact on causing rapid deterioration of any arthritic process existing in a weight bearing joint." *Id.* The Claimant testified that his employment duties as a pipefitter at Electric Boat included such activities as climbing ladders, crawling, squatting and working on his knees. TR 25-26. Based on the Claimant's testimony and Dr. Cambridge's medical opinion that these activities exacerbated the Claimant's pre-existing knee condition, I find that the Claimant has shown that working conditions existed at Electric Boat that could have aggravated his pre-existing degenerative knee condition. Thus, the Claimant has established his prima facie case and has successfully invoked the Section 20(a) presumption.

The burden now shifts to the Employer to rebut the presumption with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Shorette*, 109 F.3d at 53; *Merrill*, 25 BRBS at 144. The Employer contends that the Claimant's knee condition is not causally related to his employment at Electric Boat. The Employer relies on the medical opinion of Dr. Peter Barnett, an orthopedic surgeon who examined the Claimant for an independent medical examination on March 12, 1996 and again on February 25, 1997 and March 12, 2003. EX 2 at 1; EX 7 at 9, 11. In his deposition testimony, Dr. Barnett stated that in addition to performing physical examinations of the Claimant, he had the opportunity to review the medical records of Dr. Cambridge, the Claimant's

hospital reports from Dr. Curlin, and x-rays of the Claimant's knees taken on May 16, 1995. EX 7 at 8. Dr. Barnett testified that the x-rays revealed significant arthritis in the medial compartment of both of the Claimant's knees. *Id.* His diagnosis of the Claimant was the same as that of Dr. Cambridge: degenerative arthritis in both knees. *Id.* at 9. At his deposition, however, Dr. Barnett concluded that the Claimant's degenerative arthritis was not caused by his work as a pipefitter at Electric Boat. *Id.* at 16.

Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the Section 20(a) presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier v. Bethlehem Steel Corp*. 16 BRBS 128 (1984). In his deposition testimony, Dr. Barnett states to a reasonable degree of medical certainty that the Claimant's knee condition is not caused by his employment with Electric Boat. EX 7 at 16. However, as discussed in further detail below, he does concede that the Claimant's condition was likely aggravated by his work as a pipefitter. *Id.* Dr. Barnett's concession on this point weakens the Employer's position. On balance, however, given the relatively low threshold required to rebut the presumption, the testimony of Dr. Barnette indicating that the Claimant's knee condition was not caused by occupational factors is adequate to rebut the Section 20(a) presumption.

Because I have found that the Employer has successfully rebutted the presumption that the Claimant's knee condition is work-related, the presumption no longer controls, and I must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio*, 196 U.S. at 280; *Holmes*, 29 BRBS at 18; *Sprague,* 688 F. 2d at 862. In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). *See Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979); *Tyson v. John C. Grimberg Co.*, 8 BRBS 413 (1978).

In this instance, both Drs. Cambridge and Barnett agree that the Claimant suffers from degenerative arthritis in both knees and thus had a pre-existing condition at the time he worked for Electric Boat. However, they disagree as to whether the Claimant's work as a pipefitter for Electric Boat aggravated his condition. In his March 12, 1996 report following the independent medical examination, Dr. Barnett states that "the bilateral degenerative condition would have been a result of and contributed to by all functional activities encountered by this patient during the past 20 years of his life both in and outside his place of employment." EX 2 at 3. Dr. Barnette reiterates the same conclusion in his deposition, noting that while he does not believe that the Claimant's work at Electric Boat initiated his degenerative arthritis, the development and progression of the condition is multi-factorial, and the "physical activities he was exposed to while working at Electric Boat was part of that process." EX 7 at 17. Dr. Barnett adds that he would be unable to calculate the percentage that the Claimant's work at Electric Boat contributed to his degenerative arthritis, but that he assumes it would be a relatively small percentage. *Id.* at 17-18.

In support for its argument that the Claimant's knee condition was not caused or aggravated by his work for Electric Boat, the Employer relies on *Gencarelle v. General Dynamics*, 892 F.2d 173 (2nd Cir. 1989). The Employer argues that under *Gencarelle*, the Claimant does not satisfy his burden of persuasion in establishing cause because the activities that aggravated the Claimant's knee condition (squatting, kneeling, etc.) were not "peculiar" or "sufficiently distinct" from hazardous activities associated with other types of employment. Emp. Br. at 11-12; 892 F.2d at 177-178. As such, the Employer argues, the Claimant's knee condition does not qualify as an occupational disease under the Act. Emp. Br. at 2,3,12.

In response, the Claimant maintains that *Gencarelle* does not control the outcome of the present matter. Cl. Br. at 16-17. First, the Claimant argues that the two cases are factually distinguishable in that the Claimant's duties as a pipefitter involved more intense and severe stress to the knees than experienced by the claimant in *Gencarelle*, who was merely a maintenance worker. *Id.* at 17. Second, the Claimant argues that Board decisions since 1989 have identified a greater number of conditions, including carpal tunnel syndrome and cubital tunnel syndrome, which have been found to be hazardous for the purpose of qualifying as an occupational disease which occur both in the workplace and in life in general. *Id.* (citing *Bunge Corporation v. Carlisle*, 227 F.3d 934 (7th Cir. 2000); 34 BRBS 79 (CRT), *aff'g Carlisle v. Bunge Corporation*, 33 BRBS 133 (1999)). In *Carlisle*, the Board found that the claimant's use of job sticks and bobcap levers for significant continuous periods of time was sufficiently "peculiar" and of an "increased degree by comparison with employment generally" to warrant a finding that the claimant's condition was an occupational disease. 33 BRBS at 137. The Claimant here argues that his experience crawling and kneeling on steel grates is analogous. He notes that Dr. Barnett agreed that while kneeling on steel for extended periods of time would not be usual for the job of a lawyer, it would be usual for those who work on submarines. Cl. Br. at 17; EX 7 at 21-22.

In this instance, I find the Claimant's argument more persuasive. The Claimant's job duties as a pipefitter are distinguishable from those of the claimant in *Gencarelle*, in that the Claimant regularly worked in confined spaces while kneeling on steel grates, and he was required to climb ladders while carrying heavy tools several times each day. In addition, he performed these duties routinely and for significant continuous periods of time. Furthermore, Dr. Barnett acknowledges that the Claimant's job duties at Electric Boat played some role in aggravating his pre-existing arthritic condition. EX 7 at 17. While Dr. Barnett attempts to minimize the extent of the Employer's contribution to such aggravation, I find that his explanation of the cause of the Claimant's condition nevertheless undermines this attempt and instead indicates that the Claimant's pipefitting duties did in fact aggravate his knee condition. Based on Dr. Barnett's testimony and the conclusions of Dr. Cambridge that the Claimant's job duties aggravated his knee condition, I find that the Claimant has successfully shown by a preponderance of the evidence that his knee condition was contributed to or aggravated, at least in part, by his occupational exposure to hazardous conditions at the Electric Boat shipyard.

C. Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. Nature of Disability

There are two tests for determining whether a disability is permanent. Under the first test, a Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask,* 17 BRBS at 60. The question of when maximum medical improvement is reached is primarily a question of fact based upon medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). An administrative law judge may rely on a physician's opinion in establishing the date of maximum medical improvement. *Miranda v. Excavation Constr., Inc.,* 13 BRBS 882 (1981). Under the second test, a disability may be considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir.1968) *cert. denied* 394 U.S. 976 (1969); *Air Am., Inc. v. Dir., OWCP,* 597 F.2d 773, 781-782 (1st Cir. 1979).

In this matter, there is no dispute as to the date the Claimant reached maximum medical improvement: the parties stipulate that the Claimant reached maximum medical improvement on February 25, 1997. TR 7. The parties also agree that the Claimant's injury is permanent and that he is no longer physically capable of performing his job duties as a pipefitter. Cl. Br. at 19; Emp. Br. at 12.

2. Extent of Disability

The parties in this matter disagree as to whether the Claimant's permanent disability is total or partial. The Claimant contends that he has been unable to perform his regular work since September 9, 1995, and that he remains permanently and totally disabled. Cl. Br. at 21-22.[1] The

[1] The Claimant relies on *Louisiana Insurance Guaranty Ass'n v. Abbott* to support the assertion that he is entitled to total disability benefits during the course of his Department of Labor-sponsored vocational rehabilitation program because he was not at that time reasonably available for work within his restrictions. *See Abbot*, 40 F.3d 122, 128, 29 BRBS (CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993). In *Abbot*, the Board held that the claimant may receive continuing total disability compensation where the employer has demonstrated the availability of suitable alternate employment at a minimum-wage level, but the claimant is precluded from working due to his diligent participation in a vocational rehabilitation program. 27 BRBS at 202. In the present matter, however, the Claimant's

Claimant further argues that the Employer has failed to meet its burden of proving the availability of suitable alternate employment, and even if it had, the Claimant has nevertheless participated in a retraining program sponsored by the U.S. Department of Labor and has made a diligent effort to find work within his restrictions. *Id.* The Claimant requests temporary total disability benefits from July 31, 1995 to August 1, 1995, and again from September 9, 1995 to February 24, 1997. Cl. Br. at 1; TR 7. Furthermore, the Claimant seeks permanent and total disability benefits from February 25, 1997 to the present and continuing. Cl. Br. at 1. Alternatively, the Claimant argues that should this Court find that he is not totally disabled, he remains entitled to permanent partial disability compensation for a 40% disability based on the medical conclusions of Dr. Cambridge. *Id.* at 18; CX 5 at 10.

While the Employer does not contest the Claimant's entitlement to temporary total disability compensation, it argues that the Claimant's knee condition does not render him permanently and totally disabled from February 25, 1997. TR 12-13. The Employer contends that the Claimant's Associate's Degree in culinary arts, his license as a master plumber, and the completed coursework at Three Rivers show that the Claimant has a range of skills and earning capacity that would enable him to work. *Id.* at 13. In addition, the Employer submits that the labor market survey indicates the availability of jobs within the Claimant's restriction. *Id.* Finally, the Employer argues that the Claimant's participation as a volunteer for the Boy Scouts clearly displays supervisory and teaching skills, among others. Emp. Br. at 17.

A three-part test is employed to determine whether a claimant is entitled to an award of total disability compensation: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience and education as the employee which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *Am. Stevedores v. Salzano* 538 F.2d 933 (2nd Cir. 1976); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Air Am., Inc. v. Dir. OWCP*, 597 F.2d 773 (1st Cir. 1979); (*Legrow*), *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir.1981).

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participation in the vocational rehabilitation program at Three Rivers Community Technical College varied in its extent and his school records indicate that he did not always maintain a full course load. For example, the Claimant opted not to enroll in a Summer course in 1999. CX 7 at 8. During the Spring semester 2002, the Claimant only took (and ultimately withdrew) a three-credit Algebra course. CX 12 at 4. In the Fall semester 2002, the Claimant took only 4 credits. *Id.* At these times, the Claimant could have sought work within his restrictions on a part-time basis, but has offered no showing of his efforts to do so. Had the Employer shown the availability of suitable alternate employment during these times, the Claimant's reliance on the decision in *Abbott* would not support his contention that he is entitled to total disability benefits. However, because the Employer fails to show the availability of suitable alternate employment until the completion of the labor market survey in 2003, the Claimant need not show that he diligently sought suitable alternative employment or that he was unavailable to do so given his participation in the rehabilitation program.

The parties agree that the Claimant can no longer perform his former job duties as a pipefitter for Electric Boat. Accordingly, there is no dispute that the Claimant has successfully established his *prima facie* case. Upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the Claimant's community for individuals of the same age, experience and education as the employee which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job." *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1031 (cited in *CNA Ins. Co. v. Legrow*, 935 F.2d at 434). The Employer asserts that it has provided ample evidence of suitable alternate employment via the 2003 labor market survey. In response, the Claimant argues that the Employer has failed to provide suitable alternate employment for the Claimant, and that the Claimant nevertheless has made diligent but unsuccessful efforts to procure employment both at and outside Electric Boat. Cl. Br. at 18-19.

The Employer relies on the testimony of Sowmya Sundarajan, a vocational case manager at Concentra, and a labor market survey originally conducted by case manager Elizabeth Sinatro on May 16, 2003, and later revised by Ms. Sundarajan in May 2004. TR 71-90; EX 4; EX 9. The court notes that many of the job openings identified in the 2004 survey were previously researched and identified by Ms. Sinatro. *See* EX 4; EX 9. Ms. Sundarajan has a master's in rehabilitation counseling and is a certified rehabilitation counselor. TR 71; EX 8. She had the opportunity to review the independent medical evaluations performed by Dr. Barnett, the report of the former case manager Elizabeth Sinatro, the Claimant's college transcripts, and April 22, 2004 deposition notes. EX 9. At hearing, she testified that based on her review of these documents, she concluded that the Claimant has extensive transferable skills and was employable at the present time. TR 77.

The Claimant argues that Ms. Sundarajan completed her recommendations based on inadequate information regarding the Claimant's work restrictions. Cl. Br. at 10. The Claimant states that Ms. Sundarajan based her research on the job restrictions given by Dr. Barnett in his March 12, 2003 independent medical evaluation, which include only restrictions on kneeling and squatting. TR 74; *see* EX 3 at 2. The Claimants notes that Ms. Sundarajan also testified that she reviewed the medical reports of Dr. Cambridge, but that they did not give her an indication of the Claimant's restrictions. TR 79.

I must consider each of these positions in turn to assess their suitability for the Claimant given his work restrictions. Both Drs. Cambridge and Barnett gave the Claimant similar work restrictions, prohibiting such activities as climbing, kneeling, squatting, running, and jumping. *See* EX 7 at 11; CX 5 at 18. However, Dr. Cambridge's recommendations include a restriction against lifting objects greater than 5 pounds and working in confined spaces. CX 5 at 18. In my assessment of the suitability of the positions, I include Dr. Cambridge's lifting restriction.

The first job listed is a security guard position at Pinkerton Security (now Securitas). The Claimant argues that in 2003 he began filling out an application and noticed that the job description included tasks he could not perform, including frequent sitting, standing and walking on uneven terrain or possibly for long periods of time. In addition, the job's essential duties might have included climbing stairs and frequent lifting or moving up to 25 pounds. CX 13 at

26. Given Dr. Cambridge's lifting restriction and the climbing and walking restrictions imposed by Drs. Cambridge and Barnett, I find that the security guard position is not suitable employment for the Claimant.

The Employer also identifies three positions as a front desk clerk at the Residence Inn, Best Western Olympic Inn, and the Lyme Shore Sports Club. The two hotel jobs would require answering phones, checking guests in and out of the hotel, taking reservations, and providing information. The Residence Inn description notes that a stool is used behind the desk, but the Claimant testified that when he inquired about the presence of a stool, he was told that he would be required to stand for the entire shift. TR 40. The position description at Best Western does not mention the presence of a stool or note that the Claimant can alternate standing and sitting. EX 9 at 5. I find that both hotel positions, while listed as sedentary work, are nevertheless unsuitable for the Claimant because they would require long periods of standing. The position at Lyme Shore Sports Club, however, would enable the Claimant to alternate sitting and standing. *Id.* I thus find this position as a front desk clerk suitable employment given the Claimant's standing restrictions.

The Employer next identifies a position as a bus attendant/greeter at Foxwoods Casino, which is a position that would require the Claimant to greet incoming guests on buses and give the guests maps, directions, and other information regarding the casino. EX 9 at 6. In addition, the position requires light data entry and answering phones. *Id.* The job description states that employees have the ability to sit/stand throughout the day. *Id.* I find that this position is suitable for the Claimant because it enables him to alternate sitting and standing.

The next positions identified by the Employer are assembler positions at Faria Corporation and BST Systems, Inc., which would require the Claimant to assemble small mechanical parts or batteries at a workstation. *Id.* at 6-7. I do not find either of these positions suitable, as it is unclear whether they would require the Claimant to stand for long periods of time. I thus cannot determine if either position adheres to the Claimant's standing and walking restrictions.

The Employer also identifies an Answering Service Operator position at Central Communications, which would require the Claimant to answer phones, type messages and dispatch them to businesses. *Id.* at 7. The job description states that the Claimant would be able to sit and stand as needed. *Id.* I find that this position is suitable because it would not require the Claimant to walk or stand for long periods of time.

The Employer next identifies a counter clerk position at Barry's dry cleaners, which would entail handling customers, cash register work, and phone calls. *Id.* at 8. It would also require sorting clothes into different bins. *Id.* Although the job description notes that the Claimant would be able to sit and stand as needed and that lifting could be completed in small batches, Ms. Sundarajan testified that she did not see a seat at the counter and agreed that on a busy day that the Claimant would not have an opportunity to sit. TR 85-86. I find this position unsuitable given the Claimant's standing restrictions.

Finally, the Employer identifies a sales clerk position at Bozrah Home and Hardware. The Claimant would be responsible for handling customers, cash, and simple sales responsibilities. However, the Claimant testified that when he called Bozrah, the job description included stocking shelves, loading and unloading trucks and lifting up to 50 pounds. TR 43. I find this job to be unsuitable given the Claimant's lifting restrictions.

In sum, I have found three positions identified by the Employer to be suitable alternative employment for the Claimant: the front desk clerk position at Lyme Shore Sports Club, the bus attendant/greeter position at Foxwoods Casino, and the answering service operator position at Central Communications. The Claimant must now rebut the Employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain employment. The Claimant testified that he not only contacted every employer listed in the labor market survey prepared in 2003, but that he also conducted a diligent search on his own initiative at Electric Boat and at the career development office at Three Rivers. Cl. Br. at 7; TR 38-43.

The Claimant's testimony regarding his job inquiries external to the labor market survey remain too vague to sustain a finding that he engaged in a diligent job search. TR 47-48. The Claimant testified that he looks in the newspaper for jobs on a daily basis and that he has looked in the career center at Three Rivers, but he identifies no specific jobs, application dates or contacts. *Id.* As such, I cannot find that the Claimant engaged in a diligent search. The documentary evidence of record shows that the Claimant did apply to positions listed in the 2003 labor market survey. CX 13. The record shows that he completed online applications for bus greeter positions at Mohegan Sun and Foxwoods Casino in July 2003. CX 13 at 2, 27. He also applied for positions at Lux Bond and Green and Securitas in December 2003, and The Ramada Inn Norwich in September 2003. CX 13. The record also suggests that the Claimant informed his attorney that he submitted resumes to employers such as the Faria Corporation, BST Systems, and Ace Security, among others, but the documents are undated, unsigned, and fail to identify specific individuals the Claimant allegedly spoke with. *Id.* at 11-13. Moreover, they do not indicate whether the Claimant made any specific contacts or follow up phone calls to these potential employers. As such, I cannot credit the documents as indicating a diligent effort on the Claimant's behalf. The documentary evidence of submitted applications indicates that the Claimant submitted one application for employment every two months. I do not view this rate of submission to represent a sufficiently diligent search for alternative employment. Thus, I find that the Claimant has failed to show that he conducted a diligent job search. Therefore, the Claimant's disability is partial. Accordingly, the Claimant is entitled to compensation for a permanent partial disability for a scheduled injury. 33 U.S.C. § 908(c)(2); *PEPCO,* 449 U.S. at 277 n. 17.

Because I have determined that the Claimant is not totally disabled, the issue remains as to the extent of his permanent partial disability. Drs. Barnett and Cambridge are equally well qualified physicians who have assessed the Claimant with somewhat different permanent impairments under the *AMA Guides*. Dr. Barnett testified that on February 25, 1997 he examined the Claimant and determined that the Claimant has a 35% impairment of the right leg and a 30% impairment of the left leg. EX 7 at 9-11. After reviewing Dr. Barnett's independent medical evaluation, Dr. Cambridge reported that the Claimant maintains a 40% permanent partial disability to each knee under the *Guides*. CX 5-10. Neither physician explains how he arrived at

the permanency rating or why a discrepancy exists between them. Based on the relatively narrow discrepancy in the doctors' assessments and the fact that they are equally well qualified to make such assessments, I find that the Claimant maintains a 35% permanent partial impairment to each knee.

The Board has held that an employer can attempt to show retroactively that suitable alternate employment existed on the date of maximum medical improvement. *Rinaldi* v. *General Dynamics Corp*., 25 BRBS 128, 131, (1991) (citing *Palombo v. Director, OWCP*, 937 F.2d 70, 77 (2nd Cir. 1991)). In this case, the earliest date that the Employer attempts to show suitable alternative employment is the date of the first labor market survey, May 16, 2003. EX 4. The Employer does not contest the date the Claimant reached maximum medical improvement. Therefore, the Claimant remains entitled to permanent and total disability benefits for the closed period of February 25, 1997 to May 15, 2003.[2] Thereafter, the Claimant remains entitled to benefits for a 35% permanent partial disability to each knee based on his scheduled injury.

The Claimant has an injury to two separate body parts, both knees. Since he has suffered injuries to more than one member covered by the schedule, he must be compensated under Section 8(c)(2) for an injury to each knee, with the awards running consecutively. *See PEPCO*, 449 U.S. 268.

D. Credit

Section 14(j) of the Act provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installment of compensation due." This provision permits the employer to be reimbursed for the amount of its advance payments, where these payments were too generous, for however long it takes out of unpaid compensation found to be due. *Tibbetts v. Bath Iron Works Corp*., 10 BRBS 245, 249 (1979); *Nichols v. Sun Shipbuilding & Dry Dock Co*., 8 BRBS 710, 712 (1978). In this case, the Employer is entitled to a credit for compensation benefits previously paid.

E. Compensation Due

Based on the foregoing findings, the Claimant is entitled to temporary total disability benefits from July 31, 1995 to August 1, 1995 and again from September 9, 1995 through February 24, 1997. In addition, the Claimant is owed a period of permanent total disability compensation pursuant to Section 8(a) of the Act from February 25, 1997 to May 15, 2003, in an amount equal to 66 2/3 percent of his average weekly wage of $744.05. Thereafter, Claimant is also entitled to permanent partial disability compensation pursuant to Section 8(c)(2) for a 35% permanent impairment of each lower extremity (knee). The Employer is entitled to a credit for benefits previously paid. TR 6.

F. Medical Care

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre v. Cape Romain*

[2] See discussion, *supra* n. 2.

Contractors, Inc., 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). I have determined that the Claimant's knee condition is related to his work at Electric Boat. The Claimant is, therefore, entitled to medical care for the condition. As the responsible party, the Employer in the instant matter thus remains liable for this Claimant's medical benefits. Accordingly, I conclude that the Employer shall pay the Claimant for medical expenses reasonably and necessarily incurred as a result of the Claimant's work-related knee condition. *Colburn v. General Dynamics Corp.,* 21 BRBS 219, 222 (1988).

G. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). My Order will grant the Claimant's counsel 30 days from the date this order is issued in which to file a fee petition. My Order will the Employer 15 days from the entry of the Claimant's fee petition to file any objection.

H. Conclusion

In sum, I have found that the Claimant's knee condition was aggravated by his work for the Employer and that he is entitled to compensation under the Act. The Claimant is entitled to temporary total disability benefits from July 31, 1995 to August 1, 1995 and again from September 9, 1995 through February 24, 1997. The Claimant is also entitled to permanent and total disability benefits for the period from February 25, 1997 through May 15, 2003. Thereafter, the Claimant is entitled to permanent partial disability compensation for a 35% impairment to both knees under Section 8(c)(2) of the Act, beginning on May 16, 2003 for a period of 100.8 weeks. I have also found that the Employer is entitled to credit for previous payments under Section 14(j) of the Act and remains responsible for the Claimant's reasonable and necessary medical care.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1) The Employer, Electric Boat Corporation, shall pay directly to the Claimant, Kenneth Szablewski, temporary total disability benefits at a rate of 66 2/3 percent of the Claimant's average weekly wage of $744.05 from July 31, 1995 to August 1, 1995 and again from September 9, 1995 through February 24, 1997 pursuant to 33 U.S.C. § 908(b);

2) The Employer shall pay to the Claimant permanent and total disability benefits for the period from February 25, 1997 through May 15, 2003 at a rate of 66 2/3 percent of the average weekly wage of $744.05 pursuant to 33 U.S.C. § 908(a);

3) The Employer shall pay to the Claimant permanent partial disability benefits pursuant to 33 U.S.C. 908(c)(2) for a 35% permanent impairment to each knee beginning on May 16, 2003 for a period of 100.8 weeks with the awards running consecutively;

4) The Employer is entitled to a credit for all amounts previously paid for the knee injuries;

5) The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's employment related knee condition may require pursuant to 33 U.S.C. § 907;

6) The Claimant's attorney shall file an itemized fee petition within 30 days of the issuance of this order, and the Employer shall have 15 days thereafter to file any response;

7) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts